

Filed 12/3/20 P. v. Baker CA2/6
Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ALLEN BAKER,

Defendant and Appellant.

2d Crim. No. B293809
(Super. Ct. No. 18F-02395)
(San Luis Obispo County)

OPINION FOLLOWING
ORDER VACATING PRIOR
OPINION

Joseph Allen Baker appeals a judgment entered following his negotiated nolo contendere plea to assault upon a custodial officer, with admissions that he inflicted great bodily injury, and suffered a prior serious felony and strike conviction. (Pen. Code, §§ 241.1, 12022.7, subd. (a), 667, subd. (a), 667, subds. (d) & (e), 1170.12, subds. (b) & (c).)¹

This appeal concerns Baker's plea and admissions entered on August 29, 2018, and the challenge to his negotiated sentence

¹ All statutory references are to the Penal Code unless otherwise stated.

due to the trial court's newly granted discretion to strike the five-year serious felony enhancement of section 667, subdivision (a) (Sen. Bill No. 1393). In an unpublished opinion, we dismissed the appeal because Baker did not obtain a certificate of probable cause pursuant to section 1237.5, subdivision (b). (*People v. Baker* (B293809, Sept. 24, 2019).) Baker sought further review, and on November 26, 2019, our Supreme Court granted his petition for review.

On June 25, 2020, our Supreme Court decided *People v. Stamps* (2020) 9 Cal.5th 685 (*Stamps*). *Stamps* held that a certificate of probable cause is not required where the defendant seeks relief based upon an ameliorative change in the law. (*Id.* at p. 696 [appellate claim does not constitute an attack on the validity of the plea where the claim does not challenge the plea as defective when made].)

On October 14, 2020, our Supreme Court transferred Baker's appeal to us with directions to vacate our opinion and reconsider the appeal in light of its decision. The parties have now submitted supplemental briefs following transfer. We have complied with our Supreme Court's directions. Accordingly, we reverse and remand the matter to the trial court to permit Baker the opportunity to seek relief pursuant to Senate Bill No. 1393.

FACTUAL AND PROCEDURAL HISTORY

On August 1, 2018, the San Luis Obispo County prosecutor charged Baker by information with three counts relating to his assault and battery upon a peace or custodial officer. The information also alleged that Baker personally inflicted great bodily injury and that he suffered a prior serious felony and strike conviction and served two prior prison terms. On August 29, 2018, Baker entered a nolo contendere plea to one assault

count and admitted the prior serious felony and strike conviction. Pursuant to a negotiated plea agreement, the trial court sentenced Baker to a 12-year prison term, consisting of a two-year term for the assault count, doubled for the strike allegation, three years for the great bodily injury enhancement, and five years for the serious felony enhancement. The court imposed a \$3,600 restitution fine, a \$3,600 parole revocation restitution fine (suspended), a \$40 court operations assessment, and a \$30 court facilities assessment. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.) It also awarded Baker 214 days of presentence custody credit. The court dismissed the remaining counts and prior prison term allegations upon the motion of the prosecutor.

DISCUSSION

At the time of Baker’s sentencing, section 1385, subdivision (b) prohibited the trial court from striking any prior conviction of a section 667, subdivision (a) serious felony enhancement. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560-1561 [imposition of section 667, subdivision (a) enhancement is mandatory].) On September 30, 2018, Senate Bill No. 1393 was signed, and Baker filed his notice of appeal one month later. Effective January 1, 2019, Senate Bill No. 1393 amended section 1385, subdivision (b) to grant the court discretion to impose or to strike a section 667, subdivision (a) enhancement. (See Legis. Counsel’s Dig. to Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, p. 6672 [“This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of [a] 5-year enhancement”].)

As the parties agree, the amended section 1385, subdivision (b) applies retroactively to Baker because his judgment is not yet

final. (*People v. Stamps, supra*, 9 Cal.5th 685, 692, 699.) On remand, Baker may request that the trial court exercise its discretion and strike the five-year serious felony enhancement of section 667, subdivision (a). If the court decides to do so, “[t]he prosecution may, of course, agree to modify the bargain to reflect the downward departure in the sentence such exercise would entail. Barring such a modification agreement, ‘the prosecutor is entitled to the same remedy as the defendant -- withdrawal of assent to the plea agreement Further, the court may withdraw its prior approval of the plea agreement. The court’s authority to withdraw its approval of a plea agreement has been described as ‘near-plenary.’” (*Stamps*, at pp. 707-708.)

DISPOSITION

We reverse and remand the matter to allow Baker the opportunity to seek relief pursuant to Senate Bill No. 1393. If the trial court decides not to strike the five-year enhancement, it shall reinstate the sentence. If the court exercises its discretion to strike the five-year enhancement, the prosecution may either agree to modify the bargain to reflect the downward departure in the sentence, or withdraw approval of the original plea agreement.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

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